

A HANDBOOK ON THE WTO TRIPS AGREEMENT

This handbook describes the historical and legal background to the TRIPS Agreement, its role in the WTO and its institutional framework. It reviews the following areas: general provisions and basic principles; copyright and related rights; trademarks; geographical indications; patents; industrial designs, layout-designs, undisclosed information and anti-competitive practices; enforcement of IPRs; dispute settlement in the context of the TRIPS Agreement; TRIPS and public health; and current TRIPS issues. It contains a guide to TRIPS notifications by WTO members and describes how to access the official documentation relating to the TRIPS Agreement and related issues. Furthermore, it includes the legal texts of the TRIPS Agreement and the relevant provisions of the WIPO conventions referred to in it, as well as subsequent relevant WTO instruments and related non-WTO treaties.

The new edition covers the public health revision of the Agreement that entered into force in 2017 and provides updates on other recent developments.

ANTONY TAUBMAN is Director of the Intellectual Property, Government Procurement and Competition Division of the WTO Secretariat.

HANNU WAGER is a senior officer in the Intellectual Property, Government Procurement and Competition Division of the WTO Secretariat.

JAYASHREE WATAL is a former senior officer in the Intellectual Property, Government Procurement and Competition Division of the WTO Secretariat.

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Edited by Antony Taubman , Hannu Wager , Jayashree Watal
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WTO TRIPS AGREEMENT
Second Edition

Edited by
ANTONY TAUBMAN
HANNU WAGER
JAYASHREE WATAL



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PREFACE

At the heart of the World Trade Organization (WTO) is a set of rules that regulate trade between nations: a body of agreements which have been negotiated and signed by governments of most of the world's trading nations, with the aim of promoting transparency, predictability and non-discrimination in trading relations. These agreements, covering trade in goods, trade in services and trade-related aspects of intellectual property rights, help to define and inform the multiple roles of the WTO as an international, intergovernmental organization, in administering the provisions of these agreements, providing a forum for trade negotiations, handling trade disputes, monitoring national trade policies, providing technical assistance and capacity building for developing countries, and cooperating with other international organizations. Understanding these agreements and their practical, policy and legal contexts therefore provides significant insights into the WTO as an institution, its activities and international role, its partnerships with other organizations, and the way in which WTO member governments identify and pursue their national interests through this intergovernmental forum.

When, at the end of the Uruguay Round of trade negotiations in 1994, governments settled on the cluster of agreements that created and defined the WTO, the Agreement on Trade-Related Aspects of Intellectual Property Rights, or the TRIPS Agreement, was part of the package. The TRIPS Agreement was not negotiated as a stand-alone treaty, and did not enter into legal force on its own, but is one of the Multilateral Trade Agreements that are integral to the overarching Marrakesh Agreement Establishing the World Trade Organization. This status means that when the TRIPS Agreement entered into force in 1995, it was as part of a composite set of trade agreements that, together, are binding on countries that choose to join the WTO. The WTO Agreement also made disputes between members about trade and intellectual property subject to the same dispute settlement mechanism as is used for a wide range of trade issues. But the TRIPS Agreement also

incorporated significant elements of the established multilateral intellectual property agreements administered by the UN specialized agency for intellectual property, the World Intellectual Property Organization (WIPO). Hence the TRIPS Agreement has a dual character – an important element of international trade law, it also draws heavily on, and builds upon, the established heritage of international intellectual property (IP) law.

The TRIPS Agreement has also come to the fore in a wide range of international policy discussions – ranging over public health, biodiversity, the environment and human rights, and other debates concerning policy settings for innovation, knowledge-based economic growth and technology diffusion. The need for a practical knowledge of TRIPS, its provisions and its institutional context therefore extends beyond the traditional circle of trade negotiators and IP lawyers, and this *Handbook* has been prepared to serve the needs of this wider community of legislators, diplomats, policymakers, other government officials, representatives of civil society and industry, practitioners, journalists, students and other interested parties in the general public.

This publication is one of the series of *WTO Handbooks*, aimed at providing a non-technical overview of key elements of the WTO system. As a *Handbook* on the TRIPS Agreement, it provides a general account of the Agreement itself, and describes its objectives, principles and other provisions. The TRIPS Agreement has not been a static document since its entry into force in 1995, and the *Handbook* reflects the evolving context of TRIPS.

- The *Handbook* describes approaches taken in analysing and interpreting the TRIPS Agreement when cases have been pursued in the WTO dispute settlement mechanism (although this volume is not a legal textbook, does not explore questions of legal interpretation and should not be seen as advocating any particular approach to interpretation).
- The *Handbook* provides an overview of the institutional framework within the WTO that administers the TRIPS Agreement, in particular the TRIPS Council.
- And the *Handbook* gives an update of some key developments since the Agreement came into force, notably the 2001 Doha Declaration on the TRIPS Agreement and Public Health and the ensuing public health amendment to TRIPS, as well as ongoing negotiations and policy discussions within the WTO, and the pattern of dispute settlement.

This second edition of the *Handbook* responds to several significant developments since the first edition was published in 2011. An historic development was the entry into force, in January 2017, of the first amendment not only to the TRIPS Agreement itself but to the entire WTO package of multilateral trade law. The amendment created a new legal pathway for the most vulnerable countries to access affordable medicines. WTO dispute settlement since then has also addressed the relationship between TRIPS and public health, in considering the *Australia – Tobacco Plain Packaging* case, which shed fresh light on several aspects of the TRIPS Agreement. The TRIPS Council has taken further decisions in recognition of the distinct needs and circumstances of least-developed countries. And the policy and practical context of the TRIPS Agreement – both within and well beyond the walls of the WTO – has evolved considerably, for instance with fresh intergovernmental discussion on TRIPS and innovation policy, TRIPS and the public interest, and critical international issues such as responses to climate change.

This revised edition of the *Handbook* is up to date at the time of writing, but readers should be aware that some of the processes it describes are dynamic. Several passages have therefore been highlighted as areas where further developments may potentially have occurred since December 2019.

For reasons of space and brevity, the *Handbook* concentrates on the text of the TRIPS Agreement and on TRIPS-related developments within the WTO itself. It does not describe in detail the important discussions and debates in other international policy processes and organizations that have dealt with TRIPS. A very brief description is provided to assist the reader to understand the broader context of TRIPS, but this is not intended to give authoritative guidance, which can instead be obtained from the organizations concerned.

Prospective readers should not pick up this *Handbook* expecting close legal analysis of TRIPS provisions, nor authoritative statements about the implications or impact of the TRIPS Agreement, nor indeed any extensive descriptions of the complex policy debates that surround the TRIPS Agreement. There is a vast academic, policy and legal literature concerning the TRIPS Agreement, its interpretation and these related issues; this *Handbook* does not venture into this territory, which has been widely explored and mapped by many expert authors. Instead, this *Handbook* seeks to give the reader an accessible, non-technical overview of the Agreement, and describes how to access and make use of the official

documentation that relates to the TRIPS Agreement and the policy issues it touches on.

This volume, as its predecessor, is the product of a continuing practical dialogue with many officials in WTO members, colleagues in other international organizations, and a diverse range of scholars, civil society and industry representatives, and members of the general public. We in the Secretariat value these conversations highly and are thankful for the engagement and encouragement given. Indeed, the initiative to publish the first edition of this *Handbook* responded to the practical feedback received from countless active participants in the WTO's technical cooperation programme in the area of TRIPS. Since then, readers of the first edition have continued to offer valuable feedback, which we have endeavoured to respect in this revised edition. Readers of this updated edition are encouraged to provide further feedback (by email to ipd@wto.org) for possible use in the event of a further revised and updated edition, and to help us update and improve our outreach materials generally.

Antony Taubman
Director
Intellectual Property, Government Procurement
and Competition Division
WTO Secretariat

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- Chapter I: Hannu Wager and Jayashree Watal
- Chapter II: Hannu Wager
- Chapter III: Wolf Meier-Ewert
- Chapter IV: Thu-Lang Tran Wasescha
- Chapter V: Jayashree Watal
- Chapter VI: Wolf Meier-Ewert and Xiaoping Wu
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- Chapter IX: Hannu Wager
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- Chapter XI: Antony Taubman
- Appendices 1–2: Maegan McCann, Antony Taubman and Hannu Wager

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ACRONYMS AND ABBREVIATIONS

BATF	Bureau of Alcohol, Tobacco and Firearms
CBD	Convention on Biological Diversity
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CMO	collective management organization
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EU IPO	European Union Intellectual Property Office
EUTM	European Union Trade Mark
FDI	foreign direct investment
FRAND	fair, reasonable and non-discriminatory
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GI	geographical indication
GSPOA	Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property
ICESCR	International Covenant on Economic, Social and Cultural Rights
IP	intellectual property
IPIC	Intellectual Property in Respect of Integrated Circuits
IPR	intellectual property right
LDC	least-developed country
MFN	most-favoured nation
MSME	micro, small and medium enterprise
MTO	Multilateral Trade Organization
PDO	Protected Designation of Origin
PGI	Protected Geographical Indication
R&D	research and development
RTA	regional trade agreement
SCP	WIPO's Standing Committee on the Law of Patents
SDG	Sustainable Development Goal
TK	traditional knowledge
TNC	Trade Negotiations Committee
TPP	tobacco plain packaging
TRIPS	Trade-Related Aspects of Intellectual Property Rights

UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDESA	United Nations Department of Economic and Social Affairs
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Social and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UPOV	International Union for the Protection of New Plant Varieties
WCT	WIPO Copyright Treaty
WGTC	Working Group on the Interaction between Trade and Competition Policy
WHA	World Health Assembly
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization